UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY L. TAYLOR, Petitioner, v. TERI GONZALEZ, Warden, Respondent.	Civil No. 11cv1109 WQH (RBB) **REPORT AND RECOMMENDATION DENYING PETITION FOR WRIT OF HABEAS CORPUS [ECF NO. 1]**

Petitioner Anthony L. Taylor, a state prisoner proceeding pro se and in forma pauperis, filed a Petition for Writ of Habeas Corpus on May 19, 2011 [ECF Nos. 1, 5].[1] Taylor alleges that he negotiated a plea agreement ensuring that he would receive a twenty-year sentence. (Pet. 12-13, ECF No. 1.) He contends that despite this agreement, the trial court denied his motion to withdraw the plea and improperly sentenced him to twenty-four years in prison. (Id.) Petitioner maintains that his Fourteenth Amendment right to due process was violated as a result. (Id. at

[1] Because Taylor's Petition and Gonzalez's Answer are not consecutively paginated, the Court will cite to each using the page numbers assigned by the electronic case filing system.

13, 15-16.) He also contends that his Sixth Amendment right to effective assistance of counsel was violated when his trial attorney misadvised him during the plea negotiations. (Id. at 13, 16-17.)

Respondent Terri Gonzalez, the warden, filed her Answer to Taylor's Petition for Writ of Habeas Corpus along with a Memorandum of Points and Authorities and a Notice of Lodgment on November 9, 2011 [ECF Nos. 8, 9]. Petitioner did not file a traverse.

On October 31, 2011, Taylor filed a "Petition for Stay and Abeyance [ECF No. 7]." There, he requested that the Court stay his federal petition while he exhausted a new claim in state court. (Pet. Stay & Abeyance 4-6, ECF No. 7.) Respondents filed an opposition on November 22, 2011; the request for a stay was denied on August 23, 2012 [ECF Nos. 11, 15, 16].

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 1, 2008, in the Superior Court of California, County of San Diego, Taylor, on advice from his counsel, Tom Carnessale, pleaded guilty to attempted murder and admitted two felony-strike priors. (Lodgment No. 12, Rep's [Appeal Tr.] vol. 2, 10-12, May 1, 2008.)[2] During a chambers conference with Carnessale, the assigned judge stated that she was considering "striking the

[2] The five volumes of transcripts in Lodgment 12 are labeled volumes 1 through 5. But the captions on the face page of each show two volumes numbered 1, a volume 2, no volume 3, and volumes 4 and 5. To minimize confusion, the Court will cite to the two captioned volume 1's as "volume 1 [part 1]" and "volume 1 [part 2]." Further, volume 1 [part 2] and volume 2 are duplicate transcripts of the same hearing. The Court will refer to volume 2 when citing to the transcript of Petitioner's plea hearing.

strike and putting [the sentence] in the 20, 22-year category." (Id. vol. 5, 37, Sept. 29, 2008.)

Petitioner subsequently filed a motion to withdraw his plea on September 15, 2008; Taylor claimed that at the time of the May 1, 2008 plea, he was under stress, taking an incorrect dose of medication, and his counsel inadequately discussed the plea bargain and was overbearing. (Lodgment No. 1, Clerk's Tr. 32, 36-37, Sept. 15, 2008; Lodgment No. 12, Rep.'s Appeal Tr. vol. 5, 81.) On September 29, 2008, the court denied Taylor's motion to withdraw his plea; Judge Cookson recalled the earlier chambers conference but sentenced Taylor to twenty-four years, despite his understanding that he would receive no more than twenty-years under the plea agreement. (Lodgment No. 12, Rep.'s Appeal Tr. vol. 5, 37, 81, 86-87.) At the hearing, Taylor had new counsel; neither counsel nor Petitioner objected to the twenty-four-year sentence. (Id. at 36, 85-87.)

On October 27, 2008, Taylor filed a notice of appeal. (Lodgment No. 1, Clerk's Tr. 118, Oct. 27, 2008.) His counsel also filed a petition for writ of habeas corpus with the court of appeal. (Lodgment No. 5, In re Taylor, No. [D055495] (Cal. Ct. App. served July 14, 2009) (petition for writ of habeas corpus).) The California Court of Appeal, Fourth Appellate District, Division One, consolidated the direct appeal and the petition on August 5, 2009. (Lodgment No. 6, In re Taylor, No. D055495 (Cal. Ct. App. filed Aug. 5, 2009) (order consolidating direct appeal and habeas petition).) In a consolidated opinion, the court denied both Taylor's petition and appeal. (Lodgment No. 7, People

v. Taylor, No. D054023, slip op. at 12, 16, 18 (Cal. Ct. App. Dec. 29, 2009).)

Taylor petitioned the California Supreme Court on February 2, 2010. (Lodgment No. 10, Petition for Review, People v. Taylor, No. S179938 (Cal. filed Feb. 2, 2010).) The court denied the petition without opinion on April 14, 2010. (Lodgment No. 11, California Appellate Courts: Case Information, [http://appellatecases.courtinfo.ca.gov (select "Supreme Court," search using the supreme court case number, then select Docket)] (visited May 1, 2013).) On May 19, 2011, Petitioner filed his federal Petition for Writ of Habeas Corpus [ECF No. 1] in this Court.

Because Taylor is in custody under a state court judgment, the respondent must be the state officer who has custody of Petitioner. 28 U.S.C.A. § 2242 (West 2006); see Rules Governing § 2254 Cases, Rule 2(a), 28 U.S.C.A. foll. § 2254 (West 2006). Warden Gonzalez is the correct Respondent because she is the warden of California Men's Colony, in San Luis Obispo, California, where Taylor is currently in custody. (Answer 1, ECF No. 8.)

Petitioner also named the California Attorney General as a Respondent in his Petition. "The state's attorney general is a proper party only if the petitioner is not then confined, but expects to be taken into custody." Hogan v. Hanks, 97 F.3d 189, 190 (7th Cir. 1996); see Rules Governing § 2254 Cases, Rule 2(b), 28 U.S.C.A. foll. § 2254. "If the petitioner is in prison, the warden is the right respondent." Id. Because Taylor is incarcerated, the only proper respondent is the warden.

II. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244, applies to all federal habeas petitions filed after April 24, 1996. Woodford v. Garceau, 538 U.S. 202, 204 (2003) (citing Lindh v. Murphy, 521 U.S. 320, 326 (1997)). AEDPA sets forth the scope of review for federal habeas corpus claims:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a); see also Reed v. Farley, 512 U.S. 339, 347 (1994); Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991). Because Taylor's Petition was filed on May 19, 2011, AEDPA applies to this case. See Woodford, 538 U.S. at 204.

In 1996, Congress "worked substantial changes to the law of habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997). Amended § 2254(d) now reads:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

To present a cognizable federal habeas corpus claim, a state prisoner must allege that his conviction was obtained "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A petitioner must allege that the state court violated his federal constitutional rights. Hernandez, 930 F.2d at 719; Jackson v. Ylst, 921 F.2d 882, 885 (9th Cir. 1990); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988).

A federal district court does "not sit as a 'super' state supreme court" with general supervisory authority over the proper application of state law. Smith v. McCotter, 786 F.2d 697, 700 (5th Cir. 1986); see also Lewis v. Jeffers, 497 U.S. 764, 780 (1990) (holding that federal habeas courts must respect a state court's application of state law); Jackson, 921 F.2d at 885 (explaining that federal courts have no authority to review a state's application of its law). Federal courts may grant habeas relief only to correct errors of federal constitutional magnitude. Oxborrow v. Eikenberry, 877 F.2d 1395, 1400 (9th Cir. 1989) (stating that federal courts are not concerned with errors of state law unless they rise to level of a constitutional violation).

The Supreme Court, in Lockyer v. Andrade, 538 U.S. 63 (2003), stated that "AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1) -- whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law." Id. at 71 (citation omitted). In other words, a federal court is not required to review the state court

decision de novo. Id. Rather, a federal court can proceed directly to the reasonableness analysis under § 2254(d)(1). Id.

The "novelty" in § 2254(d)(1) is "the reference to 'Federal law, as determined by the Supreme Court of the United States.'" Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997). Section 2254(d)(1) "explicitly identifies only the Supreme Court as the font of 'clearly established' rules." Id. "[A] state court decision may not be overturned on habeas corpus review, for example, because of a conflict with Ninth Circuit-based law." Moore, 108 F.3d at 264. "[A] writ may issue only when the state court decision is 'contrary to, or involved an unreasonable application of,' an authoritative decision of the Supreme Court." Id. (citing Childress v. Johnson, 103 F.3d 1221, 1225 (5th Cir. 1997); Devin v. DeTella, 101 F.3d 1206, 1208 (7th Cir. 1996); Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996)).

Furthermore, with respect to the factual findings of the trial court, AEDPA provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

III. DISCUSSION

A. Claim One: Due Process Violations

"[A] criminal defendant has a due process right to enforce the terms of his plea agreement." Buckley v. Terhune, 441 F.3d 688, 694 (9th Cir. 2006) (citing Santobello v. New York, 404 U.S.

257, 261-62 (1971); see also Brown v. Poole, 337 F.3d 1155, 1159 (9th Cir. 2003) ("[A defendant's] due process rights conferred by the federal constitution allow [him] to enforce the terms of the plea agreement."). Clearly established federal law dictates that "the construction and interpretation of state court plea agreements 'and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law.'" Buckley, 441 F.3d at 694-95 (quoting Ricketts v. Adamson, 483 U.S. 1, 6 n.3 (1987)). When state courts improperly apply California contract law in interpreting plea agreements, they engage in an objectively unreasonable application of clearly established federal law. Id. at 695 (citing Brown, 337 F.3d at 1160 n.2).

Thus, the Court must look to state law to address the merits of Taylor's Petition. "In California, '[a] negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles . . . .'" Id. (alteration in original) (citation omitted). These agreements are interpreted "'according to the same rules as other contracts[.]'" Id. (quoting People v. Toscano, 124 Cal. App. 4th 340, 344, 20 Cal. Rptr. 3d 923, 926 (2004)). Under California law, contracts are interpreted to give effect to the "mutual intention of the parties as it existed at the time of contracting." Cal. Civ. Code § 1636 (West 2011). "Although the intent of the parties determines the meaning of the contract, the relevant intent is 'objective' -- that is, the objective intent as evidenced by the words of the instrument, not a party's subjective intent." Shaw v. Regents of Univ. of California, 58 Cal. App. 4th 44, 54-55, 67 Cal. Rptr. 2d 850, 856 (1997) (internal citation omitted).

When interpreting contracts, the written agreement is the "first and highest" evidence of the mutual intent of the parties. Pope v. Allen, 225 Cal. App. 2d 358, 364, 37 Cal. Rptr. 371, 375 (1964). If it is clear and explicit, the language of the contract governs its interpretation. Cal. Civ. Code § 1638 (West 2011); see also People v. Rabanales, 168 Cal. App. 4th 494, 505, 85 Cal. Rptr. 3d 607, 616 (2008) (quoting Ben-Zvi v. Edmar Co., 40 Cal. App. 4th 468, 473, 47 Cal. Rptr. 2d 12, 14 (1995)) ("'Where the parties have reduced their agreement to writing, their mutual intention is to be determined, whenever possible, from the language of the writing alone.'").

If the terms of a promise are ambiguous or uncertain, courts may consider the circumstances surrounding the agreement to establish the "sense in which the promisor believed . . . that the promisee understood it." Cal. Civ. Code § 1649 (West 2011); see also People v. Shelton, 37 Cal. 4th 759, 767, 37 Cal. Rptr. 3d 354, 358, 125 P.3d 290, 294 (2006). "'The Code provision permitting the showing of surrounding circumstances is not applicable to every contract which comes before a court for interpretation. It is applicable only where the language used in the contract is doubtful, uncertain, or ambiguous . . . .'" Buckley, 441 F.3d at 696 (quoting Pope v. Allen, 225 Cal. App. 2d at 364, 37 Cal. Rptr. at 375). Terms will be implied only when they are "'indispensable to effectuate the expressed intention of the parties.'" Ben-Zvi, 40 Cal. App. 4th at 473, 47 Cal. Rptr. 2d at 14 (quoting Lippman v. Sears, Roebuck & Co., 44 Cal. 2d 136, 145, 280 P.2d 775, 779 (1995)). This will only occur "'upon

grounds of obvious necessity.'" Id. (quoting Addiego v. Hill, 238 Cal. App. 2d 842, 846, 48 Cal. Rptr. 240, 243 (1965)).

Petitioner alleges that he negotiated a plea agreement ensuring that he would receive a twenty-year sentence. (Pet. 12-13, ECF No. 1.) To support this assertion, Taylor claims that his former attorney, Tom Carnessale, signed a declaration acknowledging that Taylor's "sentence would be 20 years pursuant to negotiation with the prosecution." (Id. at 12-13.) Yet, after the court accepted the plea, Petitioner asserts that "the trial court set out to sentence [P]etitioner to 24 years in prison, above and beyond the sentence that [P]etitioner was informed he would be receiving." (Id. at 12.)

Taylor maintains that after he realized that the court intended to impose a longer sentence than what he believed he would be receiving under the plea agreement, he moved to withdraw the plea. (Id.) That motion was denied. (Id.) Petitioner contends that the state court breached the plea bargain by sentencing him to twenty-four years, and this "breach by the state court provides ample justification for rescinding the plea . . . ." (Id. at 16.) Moreover, he maintains that his Fourteenth Amendment right to due process was violated when the state court denied Taylor's motion to withdraw his guilty plea and sentenced him to twenty-four years in prison. (See id. at 13.)

Taylor alleges that due process requires that "the terms of the original agreement . . . be enforced, or [Petitioner] . . . be allowed to withdraw his guilty plea." (Id. at 18.)

Respondent maintains that because Taylor is claiming a violation of his plea bargain, "the sentencing transcript becomes

relevant to show the absence of objection and, therefore, the absence of breach." (Answer Attach. #1 Mem. P. & A. 18, ECF No. 8.) She alleges that while Petitioner claims he was informed that he would be sentenced to twenty-years in state prison, the record does not support that claim. (Id. at 19.) "The plea form makes no such mention. The transcript of the taking of the plea makes no such mention. In fact, the form and the transcript of the taking of the plea informed Taylor he was facing a sentence of forty-one-years-to-life." (Id.)

The warden acknowledges that "[t]here is one place where a mention of a lesser sentence was made." (Id.) The transcript reveals that during the hearing on the motion to withdraw Taylor's plea, the trial court stated,

> The Court: [Y]es. I think the court should be fair on this. I did conduct a chambers conference. I looked at the photographs. They weren't very pretty; however, based on what the court felt might be an appropriate sentence for this particular case and the victim's recovery, I was considering striking the strike and putting it in the 20, 22 year category.

(Id. (alteration in original) (quoting Lodgment No. 12, Rep's Appeal Tr. vol. 5, 37).)

Respondent insists that this evidence shows that the court never made an agreement to a twenty-year sentence. (Id.) The court's statement that it was considering striking a strike and a sentence in the range of twenty to twenty-two years, "does not, standing alone, support a reasonable expectation that the court would necessarily impose a twenty year sentence." (Id.)

Gonzalez asserts that based on the above, "Taylor could [have] reasonably expect[ed] that the court would consider this sentencing result when it came time for sentencing, [and] at

sentencing, the court adhered to the promised approach." (Id.) At sentencing, the court dismissed a strike prior. (Id. at 19-20.) The imposition of a twenty-four-year sentence instead of a twenty-year sentence "does not show the trial court did not give consideration to the sentence referenced during the chambers conference." (Id.) Accordingly, Respondent contends that Petitioner is not entitled to relief because the decisions of the trial court were not contrary to, nor an unreasonable application of, United States Supreme Court precedent. (Id.)

When reviewing a state court decision, federal courts must look to the last reasoned state court decision as the basis of the judgment. Polk v. Sandoval, 503 F.3d 903, 909 (9th Cir. 2007). The last state court to address the merits of Petitioner's due process claim was the California Court of Appeal. (See generally Lodgment No. 7, People v. Taylor, No. D054023, slip op. at 8-12.)

The state court of appeal rejected Taylor's due process claim, finding that "the record shows there was no promise of a 20-year sentence." (Id. at 2.) The court noted that "[a] plea agreement is interpreted according to contract principles[,]" and "[t]he guilty plea form states that the sentence was left to the court." (Id. at 10.) The form was initialed and signed by Taylor, indicating that he read and understood the terms of the plea agreement, including that sentencing was left to the trial court. (Id. at 10-11.)[3] The court of appeal concluded that

[3] The court found that Taylor initialed this specific term on the plea form and signed the form, declaring under penalty of perjury that he read, understood, and initialed each item on the form. (Id. at 10.) Taylor's counsel initialed the form under oath, indicating that he had read and explained the entire plea to Petitioner. (Id.) Further, at the change of plea proceeding, the

"there is nothing in the guilty plea form, nor in the oral advisements given to Taylor, that supports that the court had promised a 20-year sentence." (Id. at 11.)

Next, the appellate court addressed trial counsel's declaration in which he stated that the court had promised a twenty-year sentence. (Id.) The court also considered "the trial court's statement at the presentencing plea withdrawal hearing that it 'was considering striking the strike and putting [the sentence] in the 20, 22-year category.'" (Id.) This evidence showed that the sentencing judge was "considering a particular sentence," and these statements "standing alone" did not "support a reasonable expectation that the court would necessarily impose this sentence." (Id. (emphasis in original).)

The appellate court determined that based on the above evidence, Petitioner could have reasonably believed that the trial court was considering dismissing the strike and enforcing a sentence in the twenty- to twenty-two-year range. (Id. at 12.) The trial court dismissed a strike prior. This was consistent with the sentencing judge's earlier comments. Similarly, selecting a twenty-four-year sentence instead of a twenty-year sentence did not demonstrate that the court failed to give due consideration to the sentence discussed in the chambers conference. (Id.) Accordingly, the California Court of Appeal found "Taylor's claim that he was entitled to plea withdrawal on

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trial court orally advised Taylor on all of the terms included in his plea agreement, including that the sentence was left to the court. (Id.) Taylor verbally indicated that he understood. (Id.)

the basis of a breach of the plea agreement [was] unavailing." (Id.)

Petitioner's due process claim fails because he has not provided the Court with any objective evidence that the trial court breached the plea agreement. Taylor contends that he was promised a twenty-year sentence, but the plea form and transcript of the plea colloquy reflect that the prosecution would "dismiss the balance of the complaint" and that the sentence was left to the court. (See Pet. 12-13, ECF No. 1; Lodgment No. 1, Clerk's Tr. 6, May 1, 2008; Lodgment No. 12, Rep.'s [Appeal Tr.] vol. 2, 9.) Petitioner initialed this term on the form. (Lodgment No. 1, Clerk's Tr. 6; Lodgment No. 12, Rep.'s [Appeal Tr.] vol. 2, 7.) Taylor understood the maximum sentence was forty-one years to life. (Lodgment No. 12, Rep.'s [Appeal Tr.] vol. 2, 9.)

This plea form is the basis for deciding the parties' mutual intent. See Ben-Zvi, 40 Cal. App. 4th at 473, 47 Cal. Rptr. 2d at 14 ("Where the parties have reduced their agreement to writing, their mutual intention is to be determined, whenever possible, from the language of the writing alone.") The plea form is clear and unambiguous and does not promise a twenty-year sentence. See Schuster v. Clark, No. 1:10–cv–01983–AWI–SKO–HC, 2011 WL 2144287, at *7 (E.D. Cal. May 31, 2011) (denying petitioner's due process claim on the basis that he failed to show that the plea agreement was ambiguous in any respect); Rodgers v. Sisto, No. 2:07–cv–02383–JKS, 2011 WL 70566, at *3 (E.D. Cal. Jan. 7, 2011) (same).

Taylor's maximum sentence was forty-one years to life. (Lodgment No. 1, Clerk's Tr. 7, May 1, 2008.) Petitioner

initialed the statement on the plea form that his maximum sentence was forty-one years to life, and he acknowledged the maximum term when he was orally advised by the trial court. (Id.; Lodgment No. 12, Rep.'s [Appeal Tr.] vol. 2, 9.) During Taylor's plea, the trial court asked whether any promises or threats had been made to him to plead guilty. (Lodgment No. 12, Rep.'s [Appeal Tr.] vol. 2, 9.) Petitioner responded, "No." (Id.)

Thus, nothing in the guilty plea form or the oral advisements given to Taylor supports his assertion that he was promised a twenty-year sentence. See Branch v. Swarthout, Civil No. 11cv857 AJB (NLS), 2011 WL 6013023, at *4 (S.D. Cal. Oct. 7, 2011) ("[T]here is no breach of the plea agreement because there was no term in that agreement that limited [petitioner's] incarceration to 15 years."); Connolly v. Curry, No. C 08–4517 MMC (PR), 2011 WL 1990571, at *5 (N.D. Cal. May 23, 2011) (denying petitioner's due process claim because the sentencing transcript and documentary evidence did not show a promise made outside of the plea agreement). Instead, the guilty plea form and the oral admonitions given to Petitioner clearly show that the terms of sentencing were left to the court, and Taylor was aware of, and fully comprehended, the terms of his plea agreement. (See generally Lodgment No. 1, Clerk's Tr. 6-8; Lodgment No. 12, Rep.'s [Appeal Tr.] vol. 2, 7-9.) It is not necessary to imply that a twenty-year sentence is a term of the plea agreement to effectuate the expressed intent of the parties. See Ben-Zvi, 40 Cal. App. 4th at 473, 47 Cal. Rptr. 2d at 14. To do so would insert terms into the contract that the Petitioner now wishes were there. See

id. (citing Levi Strauss & Co. v. Aetna Casualty & Surety Co., 184 Cal. App. 3d 1479, 1486, 237 Cal. Rptr. 473, 477 (1986)).

Given the clarity of the plea agreement, there is no reason to include implied terms to effectuate the parties' intentions. See Buckley, 441 F.3d at 696. There are no ambiguous or uncertain terms that require the Court to consider extrinsic evidence of the parties' objective intent. See id. at 696-97.

Taylor's written agreement plainly states that he could receive a sentence of "41 years to life in State Prison." (Lodgment No. 1, Clerk's Tr. 7; Lodgment No. 12, Rep.'s Appeal Tr. vol. 5, 86-87.) "The party asserting breach [of a plea agreement] bears the burden of proving the underlying facts establishing a breach." Atkins v. Davison, 687 F. Supp. 2d 964, 972 (2009) (citing United States v. Laday, 56 F.3d 24, 26 (5th Cir. 1995)). Petitioner was sentenced to twenty-four years. (Pet. 12-13, ECF No. 1.) His sentence is consistent with the plea agreement and is lower than the maximum sentence of forty-one years. (Lodgment No. 12, Rep.'s Appeal Tr. vol. 5, 86-87.) Thus, the superior court did not breach the plea agreement or improperly sentence Taylor to twenty-four years.

The state court of appeal properly concluded that Petitioner's claim of breach of the plea agreement does not entitle him to relief. This decision was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. See 28 U.S.C. § 2254(d)(1). Nor was the decision based upon an unreasonable determination of the facts. See id. § 2254(d)(2).

For all these reasons Taylor's due process claim should be **DENIED**.[4]

B. Claim Two: Ineffective Assistance of Counsel

Taylor contends that his counsel provided him with ineffective assistance by misadvising him of the terms of his plea bargain. (Pet. 13, 16-17, ECF No. 1.)[5]

> [P]etitioner was informed by his attorney that he . . . had negotiated a plea bargain for 20 years in prison in exchange for petitioner's guilty plea. It turns out this was erroneous and [P]etitioner relied on this erroneous information in making the decision to waive his constitutional rights and to plead guilty instead. Petitioner has said that he would otherwise not have pleaded guilty if he had been informed that the sentence was for 24 years in prison.

(Id. at 17.)

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[4] Taylor makes brief mention of being deprived of his right to a "fair trial." If this is intended to be an additional claim for habeas relief, the claim is flawed. First, it is unexhausted. It was not raised with the California Supreme Court. (See Lodgment No. 10, Petition for Review 1-2, People v. Taylor, No. S179938.) Second, Taylor pleaded guilty and did not go to trial. His case is unlike one where a petitioner claimed his right to a fair trial was violated where the trial court refused to enforce the plea agreement and information prejudicial to the petitioner had been disclosed to the prosecutors during plea negotiations. See McKenzie v. Risley, 842 F.2d 1525, 1536 n.22 (9th Cir. 1988). Finally, even an unexhausted claim can be denied on the merits. See 22 U.S.C.A. § 2254(b)(2).

[5] In Taylor's state habeas corpus petition, he raises two ineffective assistance of counsel claims. He complains of ineffective assistance of his initial trial counsel during plea negotiations and the taking of Taylor's plea, and the ineffective assistance of his second trial counsel at sentencing. (Lodgment No. 5, People v. Taylor, No. D054023 (petition for writ of habeas corpus at 18, 27).) In his federal Petition, Taylor argues that "the obvious failing of both trial counsels in relation to the guilty plea and 24-year sentence [constitutes ineffective assistance]." (See Pet. 13, ECF No. 1.) Yet, his claim appears to focus on the misadvice of Taylor's first attorney concerning the length of the sentence. (See id. at 17.) Nevertheless, Respondent addresses both claims in the Answer.

Respondent contends that Taylor's ineffective assistance of counsel claim fails for two reasons -- one procedural and one substantive. (Answer Attach. #1 Mem. P. & A. 22, ECF No. 8.) First, Gonzalez alleges that Taylor's claim of misadvisement is procedurally barred because it was forfeited in state court. (Id. at 23.) Next, she maintains that Petitioner's claim fails substantively because he has not met the second prong of the test outlined in Strickland v. Washington, 466 U.S. 668, 687 (1984), which requires that he suffer prejudice as a result of his counsel's ineffective assistance. (Id. at 26-27.) Respondent claims that Taylor cannot establish prejudice.

> There is no objective evidence showing a reasonable probability that Taylor would have rejected the plea had he been accurately advised that the court was considering, but not promising, a sentence in the 20- to 22-year range. If Taylor had rejected the plea agreement and gone to trial, he would have litigated a case in which there was no dispute that he attacked the victim with a knife, and he would have exposed himself to a potential sentence of forty-one years to life or more, lost the mitigating factor arising from an early admission of guilt, and lost the court's stated intention to consider dismissing a strike prior conviction so as to avoid a life sentence. Because Taylor would not likely have foregone the significant advantages of the plea had he been properly advised, there was no prejudice from counsel's misadvisemet.

(Id. at 26.)

1. Procedural Default

State courts may decline to review a claim based on a procedural default. Wainwright v. Sykes, 433 U.S. 72, 83-87 (1977). "Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to

address those claims in the first instance." Coleman v. Thompson, 501 U.S. 722, 731-32 (1991). A petitioner who has defaulted his federal claims in state court by not complying with procedural rules technically meets the requirements for exhaustion because state remedies are no longer available. Id. at 732 (citing 28 U.S.C. § 2254(b); Engle v. Issac, 456 U.S. 107, 125-26, n.28 (1982)). But federal habeas petitioners cannot "avoid the exhaustion requirement by defaulting their federal claims in state court[,]" provided the procedural default is based on an independent and adequate state ground. Coleman, 501 U.S. at 732.

"A federal habeas court will not review a claim rejected by a state court 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" Beard v. Kindler, 558 U.S. 53, 55 (2009) (alteration in original) (quoting Coleman, 501 U.S. at 729). "In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994) (citations omitted).

A petitioner's failure to follow a state procedural rule "does not prevent a federal court from resolving a federal claim unless the state court actually relied on the state procedural bar 'as an independent basis for its disposition of the case.'" Evans v. Chavis, 546 U.S. 189, 206 (2006) (quoting Harris v. Reed, 489 U.S. 255, 261-62 (1989)). "[A] procedural default does not bar consideration of a federal claim on . . . habeas review unless the last state court rendering a judgment in the case '"clearly and

expressly"' states that its judgment rests on a state procedural bar." Harris, 489 U.S. at 263 (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)). The state court may also reach the "merits of a federal claim in an alternative holding." Id. at 264 n.10. As long as the state court explicitly invokes a state procedural bar as an independent basis for its decision, the federal habeas court is required to "honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." Id. (citing Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935)).

The respondent has the initial burden of pleading an adequate and independent procedural bar as an affirmative defense in a habeas case. See Insyxiengmay v. Morgan, 403 F.3d 657, 665-66 (9th Cir. 2005); Bennett v. Mueller, 322 F.3d 573, 585 (9th Cir. 2003). The burden then shifts to the petitioner to place that defense in issue. See Bennett, 322 F.3d at 586. The petitioner may accomplish this with factual allegations and case authority that demonstrate inconsistent applications of the procedural rule. Id. At this point, the burden shifts back to the respondent to prove the bar is applicable. Id. "It is the law of this circuit that the ultimate burden is on the state, not the petitioner, to show that a procedural state bar was clear, consistently applied, and well-established at the time the party contesting its use failed to comply with the rule in question." Insyxiengmay, 403 F.3d at 666. Even if the state rule is independent and adequate, a petitioner can overcome the procedural bar by showing (1) cause for the default and actual prejudice as a result of the alleged violation of federal law or (2) that failure to consider the

claims will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 749-50.

Here, Gonzalez asserts a procedural default and maintains that Petitioner forfeited his ineffective assistance claim based on misadvisement when he failed to raise the issue in the trial court. (Answer Attach. #1 Mem. P. & A. 23, ECF No. 8.) Respondent relies primarily on the California Court of Appeal's holding that Taylor forfeited his ineffective assistance claim when he failed to request that his plea be withdrawn based an counsel's alleged misadvisments. (Id. at 22-23 (citing Lodgment No. 7, People v. Taylor, No. D054023, slip. op. at 13-14).) She also cites two California Supreme Court cases, People v. Vera, 15 Cal. 4th 269, 275-76, 62 Cal. Rptr. 2d 753, 934 P.2d 1279 (1997), overruled on other grounds by People v. French, 43 Cal. 4th 36, 47, 73 Cal. Rptr. 3d 605, 613, 178 P.3d 1100, 1107 (2008); and People v. Hernandez, 33 Cal. 4th 1040, 1051, 16 Cal. Rptr. 3d 880, 888, 94 P.3d 1080, 1087 (2004). (Id.)

To determine whether Taylor's claim is procedurally barred, the Court looks to the California Court of Appeal's opinion because it is the last reasoned state court opinion. Vansickle v. White, 166 F.3d 953, 957 (9th Cir. 1999). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim [are presumed to] rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

The court of appeal invoked a state procedural bar. (See Lodgment No. 7, People v. Taylor, No. D054023, slip. op. at 13.)

> Although the failure to move for plea withdrawal may not create a forfeiture in cases where the sentence was in violation of the plea agreement, this exception to the forfeiture rule does not apply to claims that concern a misadvisement of the sentence.
>
> Generally, an appellate court will not consider claims of error that could have been, but were not, raised in the trial court. Taylor was authorized to request that the trial court permit him to withdraw his plea based on misadvisement concerning the terms of his agreement. The record of the presentencing plea withdrawal motion shows that [counsel] . . . was aware that Taylor thought the court had promised a 20-year sentence. Further, Taylor himself was, of course, aware of what he thought his sentence was supposed to be under the agreement. Given this knowledge, the failure of both Taylor and his counsel to request to withdraw the plea when the trial court selected the 24-year sentence forfeits this challenge to his plea on appeal.

(Id. at 13-14 (citations omitted).)

Petitioner's ineffective assistance claim based on his counsel's misadvisements is procedurally barred if the rule governing its forfeiture is both adequate and independent. See Wells, 28 F.3d at 1010. A state procedural rule is adequate when the rule is "firmly established and regularly followed" at the time of the alleged default. Anderson v. Calderon, 232 F.3d 1053, 1077 (9th Cir. 2000) (citations and quotations omitted), overruled on other grounds by Bittaker v. Woodford, 331 F.3d 715, 728 (9th Cir. 2003); see also Bennett, 322 F.3d at 583 (citing Poland v. Stewart, 169 F.3d 573, 577 (9th Cir. 1999)); Wells, 28 F.3d at 1010 (stating that rule must be clear and consistently applied at the time of petitioner's default).

a. Burden of Proof

If a procedural bar is raised, the Petitioner has the burden of putting the defense in issue. See Bennett, 322 F.3d at 586. But Petitioner's burden is "quite modest: at most, Petitioner need

only assert allegations; he does not need to prove anything." Dennis v. Brown, 361 F. Supp. 2d 1124, 1130 (N.D. Cal. 2005) (citing Bennett, 322 F.3d at 585-86). Still, the state bears the ultimate burden of proving procedural default. Bennett, 322 F.3d at 585. To establish the adequacy of a state procedural rule, it must be regularly and consistently applied. Id. at 585-86. "This burden should exist whether or not the petitioner identifies the correct basis upon which to challenge the adequacy of the rule." King v. LaMarque, 464 F.3d 963, 967-68 (9th Cir. 2006).

At Taylor's sentencing hearing on September 29, 2008, he was sentenced to twenty-four years. (Lodgment No. 12, Rep.'s Appeal Tr. vol. 5, 81, 86-76.) Although the trial court had just denied Petitioner's motion to withdraw his guilty plea, neither counsel nor Petitioner objected to the length of the sentence. (Id. 85-87.) It was not until October 27, 2008, when Petitioner filed his notice of appeal that Taylor raised the issue of his counsel's misadvisements. (Lodgment No. 1, Clerk's Tr. 118.) The California Court of Appeal held that "Taylor's challenge based on counsel's misadvisement has been forfeited by [his] failure to raise the issue before the trial court." (Lodgment No. 7, People v. Taylor, No. D054023, slip. op. at 13.)

Gonzalez contends that Petitioner's ineffective assistance claim is procedurally defaulted. (Answer Attach. #1 Mem. P. & A. 22-23, ECF No. 8.) "[Petitioner's claim] is procedurally barred because it was forfeited in the state court[,]" and "[f]ailing to raise the issue in trial is a proper procedural bar." (Id. at 23.) Respondent has met her initial burden to raise procedural default as a defense. See Bennett, 322 F.3d at 585.

This initial burden, however, is not the only burden that Gonzalez must satisfy. See Bennett, 322 F.3d at 586. "[I]t is the law of this circuit that the ultimate burden is on the State, not the petitioner, to show that a procedural state bar was clear, consistently applied, and well-established at the time the party contesting its use failed to comply with the rule in question." Insyxiengmay, 403 F.3d at 666. In support of Respondent's contention that Taylor's claim is procedurally barred, she relies on the holding of the appellate court and cites two cases. (Answer Attach. #1 Mem. P. & A. 22-23, ECF No. 8.)

The first case that Gonzalez relies on is People v. Vera, 15 Cal. 4th at 275-76, 62 Cal. Rptr. 2d at 257-258, 934 P.2d at 1283-1284. (Id.) The court in Vera states that it is a "the well-established procedural principle that, with certain exceptions, an appellate court will not consider claims of error that could have been--but were not--raised in the trial court." People v. Vera, 15 Cal. 4th at 275, 62 Cal. Rptr. 2d at 257-258, 934 P.2d at 1283 (citing People v. Saunders, 5 Cal. 4th 580, 589-90, 20 Cal. Rptr. 2d 638, 642, 853 P.2d 1093, 1097 (1993)). This general principle would apply to the procedural bar asserted by Respondent. (See Answer Attach. #1 Mem. P. & A. 22-23, ECF No. 8.)

Yet, for a state procedural bar to be considered adequate, the rule must be "firmly established and regularly followed." Anderson, 232 F.3d at 1077. While Vera describes a general procedural bar of forfeiture, it does not establish that the procedural bar in this case is firmly established or regularly followed. See generally Vera, 15 Cal. 4th 275, 62 Cal. Rptr. 2d 754, 934 P.2d 1279. In fact, Vera notes that this procedural bar

is applied, "with certain exceptions." Id. Vera does little to satisfy Respondent's "ultimate" burden to "to show that [the alleged] procedural state bar [is] clear, consistently applied, and well-established . . . ." See Insyxiengmay, 403 F.3d at 666.

Gonzalez also cites People v. Hernandez, 33 Cal. 4th at 1051, 16 Cal. Rptr. 3d at 888-889, 94 P.3d at 1087. (Answer Attach. #1 Mem. P. & A. 23, ECF No. 8.) The case, however, does not address the procedural bar. See id. Rather, Hernandez is support for the general rule that a trial court has "no sua sponte duty to give [a] limiting instruction [on the use of gang evidence]." (See Answer Attach. #1 Mem. P. & A. 23, ECF No. 8.) Hernandez does not establish or discuss the adequacy of the procedural bar at issue here.

Respondent makes no allegation that the procedural bar in this case is independent and adequate, nor does she cite to a case supporting such a contention. On this basis, Respondent has failed to satisfy the burden of demonstrating that the alleged procedural bar is "clear, consistently applied, or well established." See Insyxiengmay, 403 F.3d at 666. Under these circumstances, this Court need not decide whether the rule is applied independently of federal law. See Smith v. Campbell, No. C 06-02972 MHP, 2011 WL 1321585, at *6 (N.D. Cal. Apr. 6, 2011). Because Respondent has failed to carry her burden of establishingthe adequacy of the general bar,[6] the Court will

[6] Moreover, sentencing immediately followed the trial court's ruling on Taylor's motion to withdraw his guilty plea. (See Lodgment No. 12, Rep.'s Appeal Tr. vol. 5, 82-90.) During the motion hearing, witnesses were called and multiple reasons were given reasons for the request to withdraw Taylor's plea. Counsel noted that an additional reason was the misadvisements

address the merits of Taylor's ineffective assistance of counsel claim.

2. Merits of Taylor's Ineffective Assistance of Counsel Claim

For ineffective assistance of counsel to provide a basis for federal habeas relief, Petitioner must satisfy the two-part test outlined in Strickland v. Washington, 466 U.S. at 687. First, Taylor must show that his counsel's performance was deficient. Id. Second, he must establish that counsel's deficient performance prejudiced the defense. Id. To satisfy the prejudice prong, Petitioner need only demonstrate a reasonable probability that the result of the proceeding would have been different absent the error. Williams v. Taylor, 529 U.S. 362, 406 (2000); Strickland, 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. A court need not decide whether counsel's performance was deficient before addressing whether the defendant suffered any prejudice; it is often "easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . ." Id. at 697.

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prior defense counsel made to Petitioner concerning the length of his sentence. (Id. at 36-37.) But new counsel informed the court that the issue was not ripe because Taylor had not been sentenced. (Id.) After denying the motion to withdraw Taylor's guilty plea, Judge Cookson proceeded to sentence him. (Id. at 82.) On appeal, the California Court of Appeal concluded that counsel's statements were not a timely objection that raised ineffective assistance based on misadvice from Taylor's prior counsel. (See Lodgment No. 7, People v. Taylor, No. D054023, slip op. at 14.) Thus, the claim was forfeited. (Id.) This conclusion is not based on an unreasonable determination of the facts. See 28 U.S.C.A. § 2254(d)(2).

The United States Supreme Court noted that "[s]urmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, __, 130 S. Ct. 1473, 1485 (2010). In the context of federal habeas review, "[t]he standards created by Strickland and § 2254(d) are both 'highly deferential . . . .'" Harrington v. Richter, 562 U.S. __, __, 131 S. Ct. 770, 788 (2011).

Trial counsel is presumed to be competent. Strickland, 466 U.S. at 689. "To rebut this presumption, [Petitioner] must demonstrate that his counsel's performance was unreasonable under prevailing professional norms and was not the product of sound strategy." Sechrest v. Ignacio, 549 F.3d 789, 815 (9th Cir. 2008) (citing Strickland, 466 U.S. at 688-89). Counsel's representation is deficient if "it falls outside the range of competence demanded of attorneys in criminal cases." Id.

Taylor contends that his attorney provided ineffective assistance because he misadvised him of the length of his sentence under the plea agreement. (Pet. 17, ECF No. 1.) Counsel allegedly informed Petitioner that his sentence would not exceed twenty years, but there was no agreement to a twenty-year sentence. (Id.) Taylor asserts that he would not have pleaded guilty if he knew he would receive a twenty-four-year sentence. (Id.)

> It is axiomatic that a trial is almost like a roll of the dice both for the prosecution and the defense in any given case. The fact that the prosecution, the trial court or the appellate court did not know what petitioner's defense would have been, or precisely how the trial would have unfolded before the jury, so to extrapolate from pretrial evidence that the outcome of a trial would have been is an inexact science at best and foolhardy at wors[t].

(Id. at 15.)

Gonzalez alleges that Petitioner's ineffective assistance of counsel claim fails substantively. (Answer Attach. #1 Mem. P. & A. 23-27, ECF No. 8.) Respondent maintains that Taylor does not provide any objective evidence to support his contention that there was an agreement on a twenty-year sentence. (Id. at 25-26.) She claims that Petitioner's arguments are based on his "private expectations" that were not disclosed prior to the acceptance of the plea. (Id.) These subjective beliefs alone, contends Gonzalez, "do[] not provide a basis for relief." (Id. at 26.)

Further, Respondent asserts that Taylor does not satisfy the second prong of Strickland in light of the undisputed evidence that he attacked the victim. (Id.) Gonzalez urges that absent a plea deal, Petitioner faced a "potential for a lengthy determinate sentence plus an indeterminate life sentence had the case gone to trial . . . ." (Id.) Respondent maintains that acceptance of the plea bargain was in Taylor's best interest, a fact he likely appreciated at the time of sentencing. (Id.) She asserts, "There is no objective evidence showing a reasonable probability that Taylor would have rejected the plea had he been accurately advised . . . ." (Id.) Accordingly, Gonzalez claims that Petitioner can not establish any prejudice as a result of counsel's misadvisements. (Id.)

This Court again reviews the last reasoned state court decision as the basis of the judgment. Polk v. Sandoval, 503 F.3d at 909. The last state court to address the merits of Petitioner's ineffective assistance of counsel claim was the

California Court of Appeal. (See generally Lodgment No. 7, People v. Taylor, No. D054023, slip. op. at 12-18.)

The state appellate court held that even if counsel provided Petitioner with inadequate advice about his plea, his claim still fails because there was no showing of prejudice. (Id. at 17.) The court noted that Taylor must show that "there is a reasonable probability that had he been correctly advised about the consequences of his plea he would not have pleaded guilty but would have insisted on proceeding to trial." (Id.)

Based on the evidence provided by Petitioner and the trial record, the appellate court found there was an insufficient showing of prejudice.

> [T]here is no objective evidence showing a reasonable probability that Taylor would have rejected the plea had he been accurately advised that the court was considering, but not promising, a sentence in the 20- to 22-year range. If Taylor had rejected the plea agreement and gone to trial, he would have litigated a case in which there was no dispute that he attacked the victim with a knife, and he would have exposed himself to a potential sentence of 41 years to life or more, lost the mitigating factor arising from an early admission of guilt, and lost the court's stated intention to consider dismissing a strike prior conviction so as to avoid a life sentence. Because Taylor would not likely have foregone the significant advantages of the plea had he been properly advised, there was no prejudice from counsel's misadvisement.

(Id. at 18.)

The Supreme Court, in Hill v. Lockhart, 474 U.S. 52, 58 (1985), stated that "the two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel." There, the petitioner pleaded guilty pursuant to a written plea agreement; he alleged ineffective assistance of counsel because his attorney misadvised him of his

parole eligibility date. Id. at 54-55. The Supreme Court held that in the context of guilty pleas, the prejudice prong of the Strickland test requires a petitioner to demonstrate that "counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 59. "In other words, in order to satisfy the 'prejudice' requirement, the [Petitioner] must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. Prejudice is determined based on an objective evaluation. Id. at 60 (citing Strickland, 466 U.S. at 695). It cited with approval Evans v. Meyer, 742 F.2d 371, 375 (7th Cir. 1984), as an example of an objective evaluation of a claim of prejudice. See Hill, 474 U.S. at 59. In Hill, the Court quotes the following passage from Evans: "'It is inconceivable to us . . . that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received[.]'" Id. at 59-60 (alteration in original). With this guidance, the Court will turn to Taylor's claim.

The claim of ineffective assistance fails because Taylor has not demonstrated that his counsel's performance prejudiced the outcome of his case. See Hill, 474 U.S. at 59; Strickland, 466 U.S. at 687. He provides no objective evidence showing that, absent counsel's misadvisements, there is a reasonably probability that he would not have pleaded guilty and would have proceeded to trial and, if convicted, would have been sentenced to less than twenty-four years. See Hill, 474 U.S. at 59; Turner v. United

States, No. 1:07CR152, 2009 U.S. Dist. LEXIS 18647, at *9 (E.D. Va. Mar. 4, 2009) ("Judged objectively, there is simply no reasonable likelihood Turner would have pleaded not guilty and insisted on going to trial absent [counsel's] supposed errors.").

Here, there is nothing in the record to establish that Taylor may have been able to avoid conviction or that a meritorious defense might have been available to him at trial. Petitioner attacked the victim with a knife, and he had two felony-strike priors. (See Lodgment No. 7, People v. Taylor, No. D054023, slip. op. at 15 ("When speaking to the police after his arrest[,] . . . Taylor acknowledged that he attacked the victim with a knife.") By pleading guilty, Taylor was able to avoid a possible indeterminate sentence of twenty-five years to life. (See id.) Given the potential sentence he faced had he been convicted at trial, Petitioner benefitted significantly from the plea agreement. See Ceesay v. Ryan, No. C 01-4047 SI (PR), 2003 WL 22434110, at *5 (N.D. Cal. Oct. 22, 2002) (finding no prejudice because in light of petitioner's favorable plea agreement, it was unlikely that he would have proceeded to trial).

Petitioner failed to provide any objective evidence to show that there is a reasonable probability that he would have forgone the benefits of his plea bargain and opted to go to trial, had his initial counsel correctly advised him of the length of his sentence or new counsel moved to withdraw the guilty plea. Thus, Petitioner has not established that he was prejudiced under Strickland. Hill, 747 U.S. at 60. Accordingly, the California Court of Appeal's decision was neither contrary to, nor an unreasonable application of, clearly established Supreme Court

law. See 28 U.S.C. § 2254(d)(1). Nor was the decision based upon an unreasonable determination of the facts. See 28 U.S.C.§ 2254(d)(2). For all these reasons, Taylor's ineffective assistance of counsel claim should be **DENIED**.

IV. CONCLUSION AND RECOMMENDATION

The Court submits this Report and Recommendation to the United States District Judge William Q. Hayes under 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States District Court for the Southern District of California. For the reasons outlined above, **IT IS HEREBY RECOMMENDED** that the district court issue an Order (1) approving and adopting this Report and Recommendation and (2) directing that Judgment be entered denying the Petition.

IT IS ORDERED that no later than July 5, 2013, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than July 19, 2013. The parties are advised that failure to file objections within the specified time may waive the right to raise

those objections on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 11-56 (9th Cir. 1991).

IT IS SO ORDERED

Dated: June 4, 2013

RUBEN B. BROOKS
United States Magistrate Judge

cc: Judge Hayes
All parties of record